

## Chapter 5

# After-hours Bail Decisions

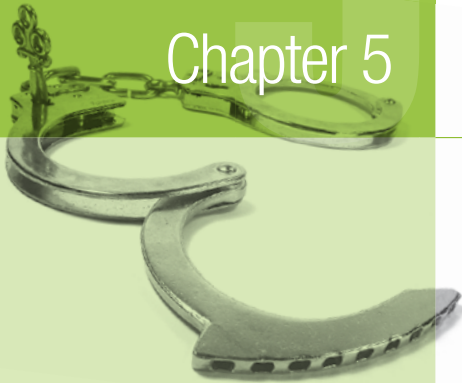


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### WHO ARE BAIL JUSTICES?

Bail justices are a unique feature of the Victorian bail system—no other state has them. Bail justices are community members who play an important role in the Victorian bail system. They are volunteers who are specially trained to hear bail applications at police stations when courts are closed. Detailed information about who bail justices are, when they are used, and what powers they exercise is in our Consultation Paper.<sup>1</sup>

### SHOULD BAIL JUSTICES BE RETAINED?

In our Consultation Paper we asked whether the bail justice system should be retained and, if not, what system would be preferable.<sup>2</sup> Aspects of the bail justice system received widespread criticism during our review. Bail justices are volunteer laypeople who tend not to grant bail. Many issues about bail justices' training, conduct, lack of diversity, and oversight of the bail justice program were discussed in the Consultation Paper.<sup>3</sup>

Despite its shortcomings, the bail justice system provides a cost-effective service which allows for prompt bail hearings for accused people who would otherwise have to wait until the next court sitting date. Bail justices make decisions in very different circumstances to those of a magistrate or judge sitting in court. Accused people are often 'at their worst' having recently been arrested, legal representation is rare, the information available is often limited, and the support services available to a court are not available after hours. Although bail justices grant bail in a relatively small percentage of cases, calling a bail justice adds to police workloads and provides a disincentive for them to seek remand of accused people unless it is really necessary.<sup>4</sup>

Bail justices also provide a review function. The arresting officer is required to give sworn evidence before the bail justice to support the grounds for remand. The supervising officer's remand decision is scrutinised almost immediately. This makes police much more accountable for their remand decisions.<sup>5</sup> Bail justices also have a role in oversight of police treatment of accused people.

Some submissions supported the retention of bail justices, but many of these noted that criticisms were valid and improvements needed to be made.<sup>6</sup> Others preferred a court-based model using either magistrates or judicial registrars—some only if substantial reform to the bail justice system was unsuccessful.<sup>7</sup>

Criticisms of the bail justice system are covered in detail in our Consultation Paper, and are addressed throughout this chapter. Arguments for retaining the bail justice system include:

- Structures and systems to support it are in place.
- It is relatively inexpensive.
- Increased involvement and administrative responsibility by the Department of Justice over the past two years has already resulted in improvements.
- Many of the issues raised in consultations and submissions are capable of being remedied by legislative, procedural, organisational and cultural change without necessarily abolishing the whole system.
- Bail justices also hear Interim Accommodation Orders for children.<sup>8</sup>
- Other recommendations made in this report may improve the performance of the bail justice system, such as the abolition of reverse onus tests, changes to the new facts or circumstances rule and inclusion of child and Indigenous specific provisions in the Bail Act.
- The current system has the support of the Children's Court, the Magistrates' Court, County Court, Victoria Police, bail justices and the OPP. At our roundtable discussion, defence lawyers indicated that if a court-based system was not practical they would support the retention of bail justices if criticisms were addressed.<sup>9</sup>

The commission carefully considered arguments for and against retention of bail justices. We are concerned by the many criticisms raised, and on the basis of those criticisms prefer a court-based system. However, we are recommending retention of the current system, in part because of the current impracticability of instituting a court-based system.

In the Consultation Paper we discussed the possibility of after-hours bail courts, such as exist in NSW.<sup>10</sup> We also discussed the newly created position of judicial registrar, and whether in future they may be able to hear bail applications.<sup>11</sup> Judicial registrars are not currently empowered to hear bail applications—magistrates would be required for after-hours hearings. After-hours courts do not have the

support of the Magistrates' Court. The court advised that the current video-link system is inadequate to facilitate bail hearings from around the state by a centralised court, which is what we had envisaged. Concerns were also raised about the limitations of video-link, such as not knowing who else is in the room with the accused and what is occurring off camera.<sup>12</sup> If video-link facilities could not be used, police would have to transport accused people to court, which would require increased resources.

Also, unless all the services available to the court during the day were available at night, many applications would simply be adjourned to daytime court sittings when support services are available. Providing all support services overnight is impracticable. While it would be easier to do if applications are heard by video-link in one centralised location, it would still require significant resources. We believe the current system is worthy of more attention before a decision is made to institute an after-hours court.

## NEW BAIL JUSTICE LEGISLATIVE FRAMEWORK

Legislative provisions that create and regulate bail justices are in the Magistrates' Court Act. The Magistrates' Court Act amended the Bail Act so that bail justices could hear and determine applications for bail in certain circumstances, replacing the previous role of justices of the peace.<sup>13</sup> The expressed policy for creation of bail justices was 'the need for trained officers to make judicial decisions about a person's liberty'.<sup>14</sup>

The provisions about bail justices are in the Magistrates' Court Act for historical reasons. The commission can see no practical reason for them to remain there. To promote clarity about the role of bail justice, and public understanding of the role, the provisions should be moved to the Bail Act. Although bail justices also hear Interim Accommodation Orders, they are called bail justices and most people would assume that information about them would be found in the Bail Act.

## RECOMMENDATIONS

42. The bail justice system should be retained and reformed in accordance with the recommendations in this report. The Department of Justice should commission an independent review of the bail justice program in three years to determine whether it is working well, or whether another system should be instituted. In the long term, an after-hours bail court should be considered.
43. The bail justice provisions in the *Magistrates' Court Act 1989* (sections 120–124) should be repealed and re-enacted in the new Bail Act in an amended form in accordance with the recommendations in this report.

## NEW BAIL JUSTICE ADMINISTRATIVE FRAMEWORK

In the Consultation Paper we discussed an internal 2004 Department of Justice review of the bail justice system.<sup>15</sup> When we started our review a Registrar of Honorary Justices administered the appointment of bail justices and kept a register of current bail justices. In the absence of support by the department, the voluntary RVAHJ and local bail justice associations supported bail justices. All bail justices are invited to join the RVAHJ, but not all do. After its review the department began to take a more active role—increasing the resources available to support the bail justice system and increasing departmental oversight of the role.

It was apparent from some submissions from bail justices that they did not believe we had adequately recognised their good work and commitment. The efforts of dedicated bail justices who have given their time to this role and to the RVAHJ or local bail justice organisations are to be commended. Actively fulfilling the role of bail justice requires considerable commitment and many bail justices go beyond this to be involved in associations.

The usefulness of associations as a means of local support and information sharing is beyond question. However, we believe it is important for the department to have responsibility for oversight of the bail justice system if the many criticisms raised in this review are to be overcome. The RVAHJ has made efforts to professionalise the role, however, it has no legal status to review, counsel, discipline or institute removal proceedings for bail justices who act inappropriately. Serious complaints about the conduct of individual bail justices have been raised with the department. These issues could not be addressed by the RVAHJ, even with increased powers, because membership is voluntary.

- 1 Victorian Law Reform Commission, *Review of the Bail Act: Consultation Paper* (2005) 37–39.
- 2 Ibid 53–55.
- 3 Ibid 39–46.
- 4 Sue King, David Bamford and Rick Sarre, *Factors that Influence Remand in Custody: Final Report to the Criminology Research Council* (2005) 80.
- 5 Ibid 83.
- 6 Submissions 8, 9, 11, 18, 19, 22, 23, 39, 41, 46, 48.
- 7 Submissions 13, 17, 24, 30, 32, 33, 38, 45.
- 8 Interim Accommodation Orders applications occur when DHS child protection workers apply to have a child removed from a family for safety reasons and placed in the care of the department: *Children and Young Persons Act 1989* s 69(5). In making recommendations, the commission has given consideration to this role. However, any scrutiny of this role by bail justices is outside our terms of reference.
- 9 Roundtable 2.
- 10 Victorian Law Reform Commission (2005) above n 1, 54.
- 11 In the Consultation Paper judicial registrars were incorrectly referred to as 'a new class of judicial officer'. They are in fact legally qualified registrars who have been delegated specific limited judicial powers. See *Magistrates' Court Act 1989* ss 16B–16K.
- 12 Roundtable 1.
- 13 The *Justices Act 1958* contained provisions about justices of the peace granting or refusing bail which are similar to the provisions which are now in the *Bail Act 1977*.
- 14 See the Second Reading Speech Victoria, *Parliamentary Debates*, Legislative Assembly, 23 March 1989, 488 (Mr McCutcheon, Attorney-General).
- 15 Victorian Law Reform Commission (2005) above n 1, 39.

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*Bail justices who actively carry out their role incur not only a time but also a financial commitment.*

Bail justices raised concerns with us, and an independent consultant employed by the department, about the RVAHJ seeking to control and direct them without authority to do so.<sup>16</sup> Some said they only remain members because they have no other way to receive updates about legislative or other changes. There is significant disagreement between bail justices about administrative issues, to the extent that there are several metropolitan and regional bail justice associations that have broken away from the RVAHJ.

We believe the way forward for the bail justice system is for the department to take greater responsibility to ensure a professional and consistent service. The department can draw on the resources necessary to properly support bail justices in their role. This includes not only financial resources, but also the authority to develop binding practices with police and other agencies, and access to legal advice and support. It would be inefficient and inappropriate for the department to provide these resources to a voluntary body such as the RVAHJ. The department is accountable to the Attorney-General and subject to government and public scrutiny.

The department has already made important changes. An Honorary Justices Coordinator, a Project Manager and other staff have been employed in place of the Registrar of Honorary Justices. This team has implemented administrative improvements which are discussed throughout this chapter. By arrangement between the Chief Magistrate and the department, the department's Court Services unit rather than the court now has responsibility for administering bail justices.<sup>17</sup> A circular was sent to all bail justices in December 2006 clarifying this. We believe the Attorney-General should formally delegate responsibility for bail justices to the department.

The Magistrates' Court will continue to be involved in training bail justices and engaging with them at a local level. Bail justice associations should also be encouraged—these provide a useful forum for the important functions of mentoring, problem-solving and information-sharing.

## ROSTERS

When we began this review, one of the most frequent criticisms we heard was that police could choose which bail justice was called to the station. This allowed police to largely control the outcome of a bail application by not calling bail justices who had made decisions they didn't agree with. In areas where there was more than one bail justice available, either the RVAHJ or local association operated a roster. However, there was still nothing to stop police calling someone other than the rostered bail justice.

The department and the Magistrates' Court commissioned an electronic call-out system to combat this problem, delegating its development to the RVAHJ. Funding to develop the system was provided by the RVAHJ and the department. This arrangement seems to have occurred because the RVAHJ wanted to do it and the Honorary Justices Registry did not have the necessary administrative support. The RVAHJ had also developed its own database of bail justices using software superior to the registry's. A practice had developed of the registry providing new appointees' details to the RVAHJ to be added to the database. Victoria Police agreed to the implementation of the electronic system, and after trials with police it was implemented in much of the Melbourne metropolitan area in 2005. The RVAHJ then sought to implement the system throughout Victoria.

A number of problems have occurred as a result of the electronic roster's implementation. First, some bail justices have raised concerns about the RVAHJ having their personal details and control of the roster when not all bail justices are members.<sup>18</sup> The RVAHJ's suggested solution to this is that membership should be made mandatory.<sup>19</sup> Bail justices are volunteers and the RVAHJ is a voluntary body. It has no accountability except to its members. In its submission the RVAHJ proposed acting as an independent body for regulation and licensing of honorary justices, in a similar role to the Law Institute and Bar Council.

## RECOMMENDATIONS

44. The Secretary of the Department of Justice should have responsibility for the administration of the bail justice system.
45. Bail justices should be deployed to bail hearings and interim accommodation hearings through a centralised call-out system, developed in consultation with bail justices, Victoria Police and the Department of Human Services (DHS). The system must be designed to be adaptable to the different needs of different locations and should be administered by the Secretary, Department of Justice.

Secondly, concerns were raised with the department about the way the RVAHJ communicated with bail justices about implementation of the roster, and responded to issues and concerns. The department was unable to resolve the problems with the RVAHJ and engaged an independent consultant to conduct a review of the roll-out of the computerised roster system. The consultant recommended that a bail justice reference group be established to agree on roster principles and remain as a forum to discuss other issues affecting bail justices.<sup>20</sup> The department has established a reference group that will deal with all issues that arise for bail justices, not just the roster. The reference group includes magistrates, police, the Department of Human Services (DHS) and bail justices from each association. They are in the process of developing sub-groups to consider particular issues and this will include a roster sub-group.<sup>21</sup>

The commission believes the role of the RVAHJ in administering the roster goes beyond what is appropriate for a voluntary organisation, but reiterate that this largely came about because the department was not fulfilling the role. There is no doubt that a centralised call-out system is to be preferred. It should ensure selection of bail justices independent of police, fair distribution of work, a standard and transparent procedure, and system monitoring. Monitoring of the system is extremely important. Feedback already suggests that some police may be trying to circumvent independent selection by recording that they have tried to contact the rostered bail justice, though the bail justice disputes receiving a call.<sup>22</sup>

The department now has its own up-to-date database of bail justices. It would be unfortunate if it had to create a parallel roster system after providing funding to the RVAHJ to develop the current system. However, our view is that the roster system should be administered by the department in consultation with Victoria Police and DHS, and with bail justices themselves. As with the appointment of bail justices, deployment of bail justices and responsibility for ensuring the integrity of that deployment is a function that should remain with an organisation directly responsible to the Attorney-General and the general public.

The department is currently trialling a centralised call-out system with three police stations in Melbourne, with call centre staff employed to take calls from police or Child Protection and then contact the rostered bail justice in the relevant region. Bail justices in the region must

only accept a call-out to a hearing if it comes through the call centre. This effectively prevents police from having any control over the bail justice chosen for the hearing, and also prevents any discussion between police and bail justices before they attend the station. The roster used by the call centre is developed by the local bail justices.<sup>23</sup> The system provides collation of information about bail justice hearings, as the bail justice logs the result of the hearing with the call centre on completion.

The department advises that feedback from the trial has been positive. The department intends to offer the roster system to other police stations around the state.<sup>24</sup>

Departmental oversight of the deployment of bail justices is also important to ensure bail justices are properly utilised. In the Consultation Paper we noted there were 491 bail justices throughout the state, though only about one-quarter were actively carrying out their role.<sup>25</sup> We are now advised there are 360 bail justices on rosters, though some are not responding when called. The implementation of the electronic roster has resulted in the resignation of some bail justices who were not willing to commit to a roster.<sup>26</sup> However, it appears there is still a large number of inactive bail justices. We believe that only those actively undertaking bail justice duties should be entitled to maintain their appointment. This is addressed in many of the recommendations in this chapter.

## REIMBURSEMENT

Bail justices who actively carry out their role incur not only a time but also a financial commitment. A bail justice must have at least a home telephone and/or mobile phone, preferably access to the internet, and access to transport to and from police stations and association meetings. The lack of remuneration or reimbursement of bail justices for these expenses was raised at our Indigenous forum. It was noted that access to such resources impacted on the diversity of bail justices and caused problems for some people in fulfilling the role. The importance of maintaining the independence of bail justices from police was also emphasised. Maintaining impartiality, both in fact and in appearance, was also raised by some participants at the after-hours bail roundtable, and by Indigenous bail justices in a recent review of the Koori Bail Justice Program.<sup>27</sup> Accepting police transport to hearings creates a perception of partiality but it is likely that some bail justices accept, and feel justified in doing so, because it reduces their costs.

- 16 Report Prepared by Max Jackson & Associates for the Department of Justice, *The Computerised Rostered Call Out System for Bail Justices: A Review of Issues Perceptions and Operational Factors: Outcome Report* (2006) 20–21; submission 44.
- 17 Consultation 59.
- 18 Submission 44.
- 19 Submission 46.
- 20 Max Jackson & Associates (2006) above n 16, 89.
- 21 Information provided by Project Director, Honorary Justices Unit, 28 February 2007.
- 22 Information provided by Project Director, Honorary Justices Unit, 16 June 2006.
- 23 Information provided by Project Director, Honorary Justices Unit, 17 May 2007.
- 24 Ibid.
- 25 Victorian Law Reform Commission (2005) above n 1, 37.
- 26 Information provided by Project Director, Honorary Justices Unit, 28 February 2007.
- 27 Department of Justice [Victoria], *Review of the Indigenous Bail Justice Program: Final Draft Report* (2006) 44.

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An appropriate system of reimbursement will allow for stricter guidelines to be imposed on bail justices regarding assistance from police. It will also encourage diversity in appointments. It recognises that bail justices contribute more than time to the role. The Office of the Public Advocate has a system in place for reimbursing Independent Third Persons (ITPs) who, like bail justices, must travel to police stations. It provides a sliding scale depending on the number of call-outs attended and a base amount. Considering the large number of inactive bail justices, we do not believe payment should be made to bail justices unless they actually attend hearings.

### DEFINING THE BAIL JUSTICE OFFICE

The RVAHJ incorrectly characterises bail justices as independent judicial officers. While justices of the peace originally had powers similar to magistrates, this is no longer the case and has not been since the Magistrates' Court Act was enacted.<sup>28</sup> The powers of justices of the peace were significantly limited by that Act. The role of bail justice was created, and its functions defined, in the Bail Act and in the *Children and Young Persons Act 1989*.

The office of bail justice does share similarities with judicial offices. Bail justices are required to take an oath<sup>29</sup> and are provided with the same protections and immunities as magistrates.<sup>30</sup> Once appointed, bail justices have the same tenure as judges and magistrates.<sup>31</sup> However, they are appointed by the Attorney-General, rather than the Governor-in-Council and the removal provisions for bail justices are no longer the same as those for magistrates.<sup>32</sup> The removal provisions for magistrates are now in the *Constitution Act 1975* along with other judicial officers.<sup>33</sup> 'Judicial office' is defined in that Act to mean judges, masters and magistrates, but does not include bail justices.<sup>34</sup> Bail justices also differ from judicial officers in that they are not lawyers and are volunteers, which means they are not subject to any oversight through the terms of their employment.

People who told us they preferred a court-based system over the current bail justice system generally thought a decision as important as removing a person's liberty should be made by a legally qualified decision maker.<sup>35</sup> The RVAHJ was angered by criticisms of the system based on bail justices not being legally qualified:

*We assert that a properly trained volunteer is completely able and intellectually qualified to read and understand the bail act ... Suggestion to the contrary, that only lawyers are capable of understanding law, is a form of such breath taking arrogance it needs no comment ...*

While we agree that laypeople can understand the law, there is no doubt that bail justices will not be aware of the interrelationship of bail, criminal and evidence law in the way that a magistrate or judge will. This is not intended as a disparagement of individual bail justices, but is a reflection of the limitations of the role. All judicial appointments, including magistrates, require legal qualifications. The Magistrates' Court was professionalised almost 20 years ago—a reflection of the complexity of matters that the court now deals with.

A bail justice has very specific powers which are not commensurate with a court's powers. The Bail Act's use of the word 'court' to in some cases include police and bail justice hearings seems to have caused some confusion in this regard. Bail justices are not appointed as judicial officers, but as justices of the peace with a specific role and limited powers. They do not have any role outside of bail and Interim Accommodation Order hearings, apart from some justice of the peace functions. This confusion will be partly overcome by our recommendation that the new Bail Act refer to specific decision makers so their powers are clearly defined.<sup>36</sup>

### DEFINING BAIL JUSTICE POWERS

In the Consultation Paper we asked about curtailing the statutory powers of bail justices in response to concerns raised with us in consultations.<sup>37</sup> There appears to be some

### RECOMMENDATIONS

46. The Department of Justice should institute a reimbursement system for bail justices based on the model used by the Office of the Public Advocate to reimburse Independent Third Persons. Reimbursement should only be made to bail justices who conduct one or more hearings throughout the year.
47. The new Bail Act should limit bail justices' decision-making role to 'granting bail' and 'authorising continued detention' of the accused by the police.

confusion about the nature and functions of bail justices, which has arisen because the distinctions between justices of the peace and judicial officers have changed.

### ADMINISTRATIVE OR JUDICIAL POWER?

Bail justices are a special class of justice of the peace, given the authority to make bail decisions. Apart from the fact that they are volunteers, they are not unusual in being delegated powers usually exercised by a court. For example, the Magistrates' Court Act provides for the appointment of judicial registrars who are delegated particular powers to hear prescribed matters. In the Supreme Court an example is a registrar of probates, who is a court employee but acts judicially in making a grant of probate.<sup>38</sup>

The power to make bail decisions can be characterised as administrative or judicial, depending on who is exercising it. For example, police are not exercising judicial power when granting bail.<sup>39</sup> As bail justices are not judicial officers, and like police are making a decision that will be reviewed by a court, they arguably exercise administrative power also.

The nature of a power can be coloured by the person or body exercising it. Many cases have emphasised that the nature of the decision maker—judicial or non-judicial—can influence characterisation of the power as judicial or non-judicial.<sup>40</sup> This can be the case even if the power is characterised as a judicial power when exercised by a judicial officer. The courts have described 'chameleon like' powers that take their character from the decision maker.<sup>41</sup>

Delineation of the powers exercised by bail justices is important. We recommend that the power exercised by bail justices be clearly defined in the new legislation as administrative to remove any confusion. The commission considers that a bail justice hearing is an independent review of the police decision. We therefore recommend that it be characterised in this way. The new Bail Act should empower bail justices to grant bail and 'authorise the continued detention' of the accused by the police, rather than remand.

Bail justices hear applications for both state and federal criminal matters in Victoria. The laws of the state concerning arrest, custody and trial apply to a person charged with a federal criminal offence.<sup>42</sup> The Victorian Bail Act therefore applies to people charged with federal offences, and state courts have jurisdiction to hear federal criminal offences. The Constitution only allows federal judicial power to be vested in state and federal courts; it cannot be vested in non-judicial bodies.<sup>43</sup> Bail justices do not fit this criterion.<sup>44</sup>

28 The *Justices Act 1958* allowed a Court of Petty Sessions (now the Magistrates' Court) to be constituted by two justices of the peace, a stipendiary magistrate or a single justice of the peace if the parties consented.

29 *Magistrates' Court Act 1989* s 120(3).

30 *Magistrates' Court Act 1989* s 124.

31 The retirement age is 70: *Magistrates' Court Act 1989* s 123(a).

32 *Magistrates' Court Act 1989* s 120(1).

33 *Constitution Act 1975* s 87AAB. These provisions were included in the Act in April 2006.

34 *Constitution Act 1975* s 87AAA.

35 Consultations 7, 22, 25.

36 Chapter 2.

37 Victorian Law Reform Commission (2005) above n 1, 45–46, 49–51.

38 *In re the Will of Mary Lucy Rider* (1901) 27 VLR 238. At 242 Hood J said: 'The act of the Registrar in granting the probate is a judicial act, and s.29 [of the Administration and Probate Act 1890] says that "every such probate or administration shall be deemed to be granted by the court"'. This can be contrasted with a bail justice decision which is reconsidered by a court within a short time, usually the next court sitting day.

39 '... it is no part of the function of the police to exercise judicial power ... activities such as apprehension and questioning of suspects, fingerprinting, detention, and refusal of bail are all administrative activities that are intended to be aimed at furthering the course of justice ...': AM Gleeson, 'Police Accountability and Oversight: An Overview' in David Moore and Roger Wettenhall (eds) *Keeping the Peace: Police Accountability and Oversight* (1994) 24.

40 Examples are: *R v Spicer; Ex parte Australian Builders Labourers' Federation* (1957) 100 CLR 277, 305 (Kitto J); *R v Hegarty; Ex parte The Corporation of the City of Salisbury* (1981) 147 CLR 617, 628 (Mason J) (with whom Gibbs CJ, Stephen and Wilson JJ agreed); *Re Dingjan* (1995) 183 CLR 323, 360 (Gaudron J); *Yanner v Minister for Aboriginal & Torres Strait Islander Affairs* (2001) 108 FCR 543, 554 (Sackville J).

41 *R v Quinn; Ex parte Consolidated Food Corporation* (1977) 138 CLR 1, 18, (Aickin J); *Kioa v West* (1985) 159 CLR 550, 612 (Brennan J); *Luton v Lessels and Another* (2002) 210 CLR 333, 387–388 [188–189] (Callinan J).

42 *Judiciary Act 1903* (Cth) s 68.

43 *Commonwealth Constitution* s 71.

44 Section 23C of the *Crimes Act 1914* (Cth) provides that a person under arrest for a Commonwealth offence must be brought before a judicial officer within the prescribed investigation period. Judicial officer is defined to mean a magistrate, justice of the peace or person authorised to grant bail under the law of the state where the person was arrested. Federal judicial power may only be vested in state and federal courts. It cannot be vested in non-judicial bodies. Aspects of judicial power may be delegated by courts to non-judicial officers of the court provided that judges continue to bear the major responsibility for the exercise of judicial power, and provided that the decisions of non-judicial officers may be reviewed or appealed on questions of fact and law: *Harris v Caladine* (1990) 172 CLR 84. The federal jurisdiction of state courts may be exercised by a master, registrar or other officer of the court: *Commonwealth v Hospital Contribution Fund of Australia* (1982) 150 CLR 49. Bail justices do not form part of a court, although their decisions are subject to *de novo* review by courts in most instances. If bail justices are exercising judicial power in determining bail applications, then to the extent that the *Judiciary Act 1903* vests federal judicial power in bail justices, it is invalid. If bail justices are exercising an administrative power, then this problem does not arise.

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This has not been considered a problem thus far, but is another reason why it is preferable for bail justice's power to be clearly defined as administrative.

### DETENTION LENGTH

Bail justices have the power under section 12(1A) of the Bail Act to remand an accused for up to eight days. Despite this, current practice is to remand an accused to the next court sitting day unless this is not possible. In the Consultation Paper we asked if bail justices should only be able to remand accused people to the next sitting date of the court.<sup>45</sup> This change was supported by all submissions that responded to this issue.<sup>46</sup> Two submissions said they had no problem with the change but thought the current provision allowed for contingencies and perhaps should be retained.<sup>47</sup>

We have not heard any compelling argument for retaining the power to remand for up to eight days. Accused people should be brought before a court, where they have access to legal representation and support services, as soon as possible. It might sometimes be the case, as Stephen Mayne's submission suggested, that a person might be due to appear in court in two days on another matter, so could be remanded until then. A person's liberty should not be subject to administrative convenience. In such cases it is quite common for the other matter to be brought forward and dealt with on the day the accused is brought before the court.

The commission is concerned that some accused people may be remanded for lengthy periods because their local court does not sit every business day. In some regional areas the local court does not sit five days per week. If the local court is not sitting on the next business day, the bail justice should authorise detention of the accused only until the next business day and the accused should be taken before the nearest court which is sitting that day.

### HEARING APPLICATIONS FOR ANY OFFENCE

The Bail Act allows bail justices to make decisions for all offences except murder and treason. In the Consultation Paper we asked whether bail justices should retain the power to hear applications for serious indictable offences, particularly those that currently require exceptional circumstances to be shown.<sup>48</sup>

Submissions were divided on this issue.<sup>49</sup> As discussed in Chapter 3, we recommend that all bail applications be decided on the basis of unacceptable risk, with no distinctions based on offence category. We can see no justification for making distinctions between offences for bail justices. This would unnecessarily complicate the new Bail Act, and may also lead to accused people spending more time in custody. In its response on this issue the RVAHJ said: 'This would introduce a double-system and increase complexity. There is no suggestion in the Consultation Paper that bail justices are releasing people inappropriately!'

Victoria Police submitted:

*In the interests of ensuring accused persons are processed without unnecessary delays, it is suggested that rather than restricting the authority of bail justices to make bail decisions for persons accused of certain offences, appropriate training and support should be provided to bail justices to enable them to undertake this role effectively.*

We agree with this view, and believe the recommendations in this chapter will help professionalise the bail justice system and ensure better training, information and support. This should lead to increased confidence in bail justice decisions.

We recommend bail justices be able to hear bail applications for any offence, including homicide. Based on past bail justice decisions, it is unlikely that bail justices would bail a person accused of murder. However, they will provide independent scrutiny of the police decision and explain bail rights to accused people, and the considerations involved in the bail decision. Our recommended change to the new facts and circumstances rule will mean that accused people will not be prevented from making further applications before the court even if they are legally represented at the bail justice hearing.<sup>50</sup>

During the course of this review we have seen media reports about bail justices conducting hearings for accused people charged with homicide.<sup>51</sup> It therefore appears that some police currently call a bail justice when they should not. We assume this occurs after the accused is held for some time and is done to provide validation of continued detention, even though bail justices do not have the power to do so.

*We recommend bail justices be able to hear bail applications for any offence, including homicide.*

## DIVERSITY

In the Consultation Paper we discussed the lack of diversity among bail justices. The overwhelming majority of bail justices are male, aged over 50 and of Anglo-Saxon background. There was a perception among some people consulted that this contributed to a lower bail rate because of a more conservative viewpoint.

The need for greater diversity of age, gender and ethnicity was noted by the RVAHJ after conducting a survey of bail justices in 2000.<sup>52</sup> Some submissions pointed out the difficulty in attracting younger applicants and women, particularly those with young children, because of the requirement to attend hearings during the night.<sup>53</sup> Others thought that maturity and expertise were more important considerations than diversity.<sup>54</sup>

The Department of Justice is developing a new recruitment system to increase diversity and target locations where there are shortages of bail justices. This will include identifying suitable applicants through liaison with local governments, members of parliament, regional departmental officers and the Victorian Multicultural Commission. New bail justices will be recruited through this process after a new training process is put in place.<sup>55</sup>

Diversity of bail justices should be encouraged, as it has been in the public service and police for some time, and more recently in judicial appointments.

## INDIGENOUS BAIL JUSTICE PROGRAM

The Aboriginal Bail Justice Program incorporates Indigenous Australians into the decision-making process and is an example of the need to target particular groups who may not otherwise consider this role. A number of issues about the program were raised in our Consultation Paper.<sup>56</sup> The program has recently been reviewed and a report commissioned by the Department of Justice was tabled at the Aboriginal Justice Forum in March 2007.<sup>57</sup> It was accepted by

the forum but the recommendations have not yet been considered. The report recommends expansion of the program; however, it also noted that its objectives are unclear and recommends the objectives be clearly defined and promoted.

The report covers many of the general issues about bail justices the department is currently looking at, but considers them specifically for Indigenous bail justices. This includes consideration by the department of improved recruitment, training and mentoring for bail justices, and reimbursement of expenses involved in carrying out the role. Most of these concerns are addressed by the recommendations in this report.<sup>58</sup> We believe it is appropriate to leave specific consideration of the Aboriginal Bail Justice Program review report to the Aboriginal Justice Forum.

## ACCREDITATION AND TRAINING

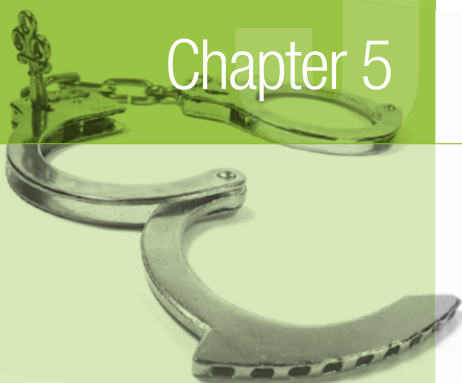
Until recently, the process for applying for appointment as a bail justice was simply to send a written application to the Justices of the Peace and Bail Justices Registry and provide three written references. After vetting by a selection panel, applicants completed a three-day accreditation course: two days with trainers and one day of home study. This process relied on individuals nominating themselves and did not take into account the needs of the system, such as supplying bail justices to areas with insufficient numbers. It also did not prepare applicants for the reality of fulfilling the role. Many applicants dropped out during the accreditation course, or did not remain on a roster after appointment.

The Department of Justice has undertaken considerable work to improve the recruitment criteria and process for bail justices.<sup>59</sup> The new process includes targeting applicants in areas of low bail justice numbers through the locally-based nomination process discussed. This process will not only assist diversity but also identify suitable people who may not otherwise have considered applying. The criteria also emphasises

## RECOMMENDATIONS

48. The new Bail Act should stipulate that bail justices may only authorise the continued detention of the accused to the next business day. If the local court is not sitting that day, the accused must be taken to a court in that region that is sitting.
49. The new Bail Act should provide that bail justices can grant bail to or authorise continued detention of an accused charged with any offence.
50. The Department of Justice should continue to encourage diversity of bail justices by promoting the bail justice program among women, younger adults, and people of diverse cultural backgrounds.

- 45 Victorian Law Reform Commission (2005) above n 1, 49–50.
- 46 Submissions 11, 23, 24, 30, 32, 33, 38.
- 47 Submissions 11, 46.
- 48 Victorian Law Reform Commission (2005) above n 1, 49.
- 49 Submissions 8, 11, 18, 19, 23, 24, 38, 46 thought bail justices' power to grant bail should remain as it is. Submissions 14, 17, 22, 30, 32, 39, 41 thought it should be restricted—of these, some thought bail justices should not be able to grant bail for any serious indictable offences, others just exceptional circumstances offences.
- 50 See discussion in Chapter 6. The recommendation will allow accused people to be represented at a bail application made within two court-sitting days of arrest without having to show new facts and circumstances in order to re-apply.
- 51 For example: Andrea Petrie, *'Black widow' lit fatal house fire: police* (2005) *The Age* <[www.theage.com.au](http://www.theage.com.au)> at 12 August 2005; John Silvester et al, *'I Give Up'*, *The Age* (Melbourne) 21 June 2007, 1.
- 52 Submission 46.
- 53 Submissions 13, 19.
- 54 Submissions 11, 17, 18, 36.
- 55 Information provided by Project Director, Honorary Justices Unit, 28 February 2007.
- 56 The Aboriginal Bail Justice Program is discussed in more detail in Victorian Law Reform Commission (2005) above n 1, 42.
- 57 Department of Justice [Victoria] (2006) above n 27.
- 58 The report was received too late for detailed consideration in this review. We also did not consider it appropriate to consider and endorse recommendations before they are adopted by the Aboriginal Justice Forum.
- 59 This includes making information about the criteria for selection of bail justices available on the department's website: Department of Justice, *Bail Justice Appointments Information and Forms* (2007) <[www.justice.vic.gov.au](http://www.justice.vic.gov.au)> at 16 February 2007.



that the applicant must be willing to carry out the duties of a bail justice at all reasonable times and at locations within a reasonable distance.

For people without legal training, a three-day course is inadequate to cover the legal, procedural, ethical and social context issues involved in bail applications. One bail justice who completed the course in 2004 told us the training 'was plainly too short'.<sup>60</sup> The same bail justice noted the difficulty that he and others experienced in their initial interpretation of the Bail Act, such as knowing which offences were indictable. Training must not only cover the Bail Act but provide bail justices with sufficient knowledge of criminal and evidence law for them to properly undertake their role. Being able to 'read and understand the Bail Act' as the RVAHJ submitted is not an adequate qualification to make bail decisions.

Two submissions also raised the importance of bail justices receiving training about the specific disadvantage faced by some accused people in dealing with the criminal justice system. Issues raised in submissions included youth, mental health, drug dependence, homelessness and cultural background.<sup>61</sup> At our Indigenous Forum, participants raised the need for cultural awareness training for bail justices, particularly about the risk of deaths in custody. They also thought bail justice training should include:

- awareness of the support mechanisms available for Indigenous Australians, such as VALS and Aboriginal Community Justice Panel (ACJP) workers

- the need to ensure police policy requirements have been adhered to, for example, that VALS and the ACJP have been notified an Indigenous Australian is in custody
- the need to ask about Indigenous status—police often assume someone is not Indigenous because of their appearance.

Indigenous awareness training for people in the criminal justice system was also a recommendation of the Royal Commission into Aboriginal Deaths in Custody.<sup>62</sup>

The department is developing professionalised accreditation and ongoing training for bail justices which will be offered through Victoria University, which also provides registrar training courses.<sup>63</sup> We believe completion of a course of accreditation is a crucial requirement to becoming a bail justice and should be included in legislation. Qualifications as an eligibility requirement for appointment are routinely included in legislation, such as the requirement for judicial registrars to be legally qualified.<sup>64</sup> The course should cover the issues raised above.

Bail justices are volunteers and their socioeconomic circumstances may vary. To encourage diversity in bail justices, and recognise they are already volunteering their time and energy, the accreditation course should be free.

As discussed, we recommend that the legislative provisions governing bail justices should be contained in the Bail Act, not the Magistrates' Court Act. Section 120 of the Magistrates' Court Act provides for the appointment of bail justices and section 121 provides that a person who holds

## RECOMMENDATIONS

51. Sections 120 and 121 of the Magistrates' Court Act should be repealed and re-enacted in the new Bail Act with the following additions:
  - Section 120 should be amended so that people are not eligible for appointment as a bail justice unless they have satisfactorily completed a course of accreditation prescribed by the Secretary, Department of Justice.
  - Section 121(3) should be amended so that people who are a bail justice by virtue of being a prescribed office holder may not act as a bail justice unless they have satisfactorily completed a course of accreditation prescribed by the Secretary, Department of Justice.
52. The bail justice accreditation course should be designed to ensure bail justices are adequately trained in the legal, procedural, ethical and social context issues involved in bail applications. This must include Indigenous awareness training.
53. The course should be provided at no cost to bail justices.
54. The Department of Justice should provide regular information to bail justices. Material should be available electronically and remain available on a website accessible by bail justices so new appointees can access past material.

a 'prescribed office' in the public service is a bail justice by virtue of that position.<sup>65</sup> These provisions should be re-enacted in the new Bail Act in plain language, with an addition to reflect the importance of adequate training. The Act should require that people cannot act as bail justices unless they have satisfactorily completed training.

## INFORMATION AND UPDATES

In the Consultation Paper we asked if there was a need for regular communication between the Department of Justice and bail justices.<sup>66</sup> Submissions from bail justices expressed concern that they may be unaware of important legislative and procedural changes because there is no formal system to provide them with updates.<sup>67</sup> Until recently the only communication bail justices received was the RVAHJ quarterly newsletter. Bail justices who are not members of the RVAHJ do not receive the newsletter. Some bail justices told us they only remain members of the RVAHJ to receive this type of information.<sup>68</sup>

Most submissions emphasised the need for communication and training to be provided by the department.<sup>69</sup> Some emphatically saw this as the role of the department rather than the RVAHJ or local associations.<sup>70</sup> We agree that it is the department's responsibility to ensure all bail justices are properly informed and trained. Bail justices are already volunteering their time. They should not be forced to join and fund an association to obtain the information necessary to fulfil their role.

The department has begun communicating regularly with bail justices through circulars on topical issues. Information about our review, the compellability of bail justices as witnesses, and clarification of governance issues has been provided. This format should be used to provide updates to bail justices about any legislative or procedural changes to bail and important court decisions affecting the exercise of discretion under the Act. The department has advised that the circulars will be included in the online training materials so new bail justices are aware of them.<sup>71</sup>

The department should consider regular email updates that direct bail justices to a website containing the information. The website could contain links to the Bail Act and other relevant legislation, previous updates, non-identifying information on complaints about bail justices to highlight the standard of conduct expected, and any information or feedback from the Magistrates' Court. As some bail justices may not have access to the internet, updates should still be available through regular mail-outs.

## RE-APPOINTMENT AND REFRESHER TRAINING

Regular updates from the department to bail justices are important but not enough. There is currently no requirement that bail justices undertake ongoing training after appointment. The need for ongoing training was raised in an internal departmental review of bail justices, and concerns were raised with us in consultations and submissions.<sup>72</sup> In the Consultation Paper we asked whether bail justices should be:

- appointed for limited terms
- required to undertake mandatory refresher courses
- eligible for re-appointment only if they successfully complete refresher training.<sup>73</sup>

Ongoing training to ensure bail justices are applying the current law and are aware of current practices is essential. Refresher training is currently offered by the RVAHJ, but the training is irregular, not always offered at locations convenient for regional bail justices and is paid for by bail justices themselves. However, the RVAHJ has undertaken considerable work to professionalise its training.

The RVAHJ advised us that refresher training is significantly different from the initial training.<sup>74</sup> The Chief Magistrate is normally available for one day and a County Court judge and Supreme Court justice attend. Presentations are also provided by:

- the Melbourne University Department of Criminology
- Aboriginal bail justices, who provide cultural awareness training
- the Central After-Hours Assessment and Bail Placement Service (CAHABPS), which attends bail hearings involving children.

In its submission the RVAHJ said it is moving to full recognition as a registered training organisation and noted the problem with attendance at refresher training not being mandatory.

All submissions from bail justices supported the need for some form of further training. Bail justice Stephen Mayne thought this should only occur when major changes to the Act take place but most submissions, including from bail justices, thought training should be regular and mandatory.<sup>75</sup> Many submissions emphasised the need for communication and training to be provided by the department.<sup>76</sup>

60 Submission 8.

61 Submissions 30, 32.

62 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 3, recommendation 96.

63 Information provided by Project Director, Honorary Justices Unit, 28 February 2007.

64 *Magistrates' Court Act 1989* s 16C(4).

65 'Prescribed office' includes court registrars (above a certain classification), County and Supreme Court associates, and Supreme Court prothonotaries: *Magistrates' Court General Regulations 2000* r 202.

66 Victorian Law Reform Commission (2005) above n 1, 46.

67 Submissions 18, 36, 44.

68 Submission 44.

69 Submissions 17, 18, 32, 36, 44.

70 Submissions 36, 44.

71 Information provided by Project Director, Honorary Justices Unit, 28 February 2007.

72 Victorian Law Reform Commission (2005) above n 1, 43; submissions 18, 32, 36, 44.

73 Ibid 46.

74 Roundtable 2.

75 Submissions 19, 44, 46 from bail justices, and submissions 13, 22, 29, 30, 32, 39, 48.

76 Submissions 17, 18, 32, 36, 44.

## Chapter 5

# After-hours Bail Decisions

*The best way to ensure bail justices are adequately trained is to link refresher training to re-appointment.*

A 2004 internal Department of Justice review considered creating fixed-term appointments for bail justices, with re-appointment conditional on attendance at refresher training.<sup>77</sup> In the past justices of the peace had to apply every three years for renewal of registration.<sup>78</sup> Fixed-term appointments received support in consultations and submissions.<sup>79</sup> We believe fixed-term appointments could both ensure attendance at training and overcome the problem of large numbers of inactive bail justices.

The department's review considered fixed terms of three or five years. Submissions addressing this varied, with some suggesting three years and others five.<sup>80</sup> We believe five years without further training is too long and recommend three-year terms be adopted. Although bail legislation may not change frequently, other criminal and evidence legislation that may impact on bail decisions does, as does practice and procedure and support services.

The best way to ensure bail justices are adequately trained is to link refresher training to re-appointment. However, simply attending training is not sufficient. There must be some measurement of satisfactory completion of the training to ensure participants have understood the material. Satisfactory completion of the training will only result in eligibility for further

appointment—re-appointment will not be automatic. The provision we recommend leaves discretion with the Attorney-General. However, we foresee that re-accreditation will generally result in re-appointment in the absence of any conduct or availability issues.

The re-accreditation course should be provided free to bail justices. For this reason, and access to qualified legal educators, we believe the training should be provided by the Department of Justice. It is not sufficient for current bail justices to train new bail justices, even with the assistance of the Magistrates' Court as currently occurs. The expertise of the Magistrates' Court should continue to be drawn on and magistrates and current bail justices should be involved in the training. However, neither are likely to have the time to develop comprehensive training courses or expertise in the legal education of laypeople.

We also believe it is important for the department to have the authority to direct bail justices to attend training. This would cover situations where police or other participants in a hearing believe the bail justice is not aware of current law or procedures. If, after investigating such an allegation, the department is satisfied that further training is required, it should be able to direct a bail justice to attend.

## RECOMMENDATIONS

55. The new Bail Act should provide that:

- Bail justice appointments be limited to a fixed tenure of three years, with the potential for re-appointment.
- To be eligible for re-appointment, bail justices must have:
  - satisfactorily completed a re-accreditation course
  - not unreasonably been unavailable to perform their duties when rostered, or unreasonably been unavailable for the roster.

Beyond these two eligibility criteria, re-appointment should be at the discretion of the Attorney-General.

56. Re-accreditation courses should be provided by the Department of Justice at no cost to bail justices.

57. The new Bail Act should require bail justices to attend training as directed by the Secretary, Department of Justice when reasonably required to do so.

58. The new Bail Act should retain the current age limits for appointment and retirement of bail justices: appointment up to the age of 65 years and retirement at 70 years of age.

59. The new Bail Act should stipulate that a person who was a bail justice immediately before the new legislation comes into force should continue to be a bail justice under the new legislation as if the person had been appointed under the new legislation and subject to the new terms and conditions of that legislation.

Existing bail justices should not be required to undertake re-accreditation when the new Bail Act comes into force. This would be unduly onerous and could result in insufficient numbers of bail justices while training occurred. A person who was a bail justice before the new Bail Act is enacted should continue in the role, subject to the new terms and conditions of the legislation.

The age limits for bail justice appointment and retirement are in the Magistrates' Court Act. The cut-off for appointment is 65 years of age, and a bail justice ceases to hold office at 70 years of age.<sup>81</sup> Although we heard of one bail justice who was unhappy about retiring at 70 years, the retirement age was not raised by anyone else and we believe the current age is appropriate. The cut-off age for appointment was not raised with us at all and given the resources that go into training and appointment of bail justices we believe the cut-off age is also appropriate.

## CODE OF CONDUCT

There are no legislative provisions about bail justice conduct apart from the removal provisions discussed later in this chapter. The RVAHJ has a code of conduct for its members that provides for misconduct to be considered by an ethics committee.<sup>82</sup> The RVAHJ code provides a guide to an acceptable standard of conduct for bail justices; however, the only sanction that can be applied is expulsion from the RVAHJ.

The Department of Justice issued a Code of Conduct for Bail Justices in 1997. The 2004 departmental review of bail justices redrafted the code and distributed it for comment. The code is still in draft form because the department is

awaiting the outcome of our review to finalise its terms. Submissions from the RVAHJ and other bail justices noted the problem of 'lack of teeth' in the draft code.<sup>83</sup> The Knox bail justice association also noted that the code lacks procedures for reporting inappropriate behaviour.

Some very serious complaints about bail justices' conduct have been reviewed by the department. These include: allegations of impersonating other public officials in dealings with the public; public association with known criminals; overstating powers to members of the public, such as suggesting bail justices have 'investigative powers' similar to police; and forged credentials used for appointment as a bail justice. Two other complaints regarded personal problems that meant the bail justice was no longer suitable to carry out the role.

We have also been told of inappropriate behaviour by bail justices during hearings. This included bringing family members or pets to hearings, appearing intoxicated at hearings, refusing to provide reasons for a decision when asked, and conducting hearings after having acted as an Independent Third Person for the accused.<sup>84</sup> These are probably isolated incidents but bring the bail justice system into disrepute.

At our roundtable on after-hours hearings, some participants talked about the perceived lack of impartiality of bail justices. This was said to result from social relationships between bail justices and police, bail justices speaking to police before hearings and accepting transport from police to hearings.<sup>85</sup> It is likely that most bail justices are aware that the appearance of impartiality is as important as actually being impartial.<sup>86</sup>

## RECOMMENDATIONS

60. A detailed code of conduct should be introduced for bail justices—to be included as either a schedule to the new Bail Act or as regulations. The Bail Act must state that bail justices must adhere to the code of conduct.
61. The code of conduct should be based on the 2004 draft code produced by the Department of Justice and the recommendations in this report, and should include the following:
  - bail justices are required to act impartially, with independence and integrity in the performance of their role, and appear to be doing so
  - bail justices must conduct themselves appropriately in private and publicly
  - bail justices must not be unreasonably unavailable at the times for which they are rostered
  - bail justices must limit contact with the media about their bail justice duties to the provision of their decisions and reasons
  - bail justices must not arrange or accept transport by police to the police station
  - bail justices must not discuss the application with police before the hearing.

77 Information provided by Court Services, Department of Justice, 27 July 2005.

78 *Magistrates' Courts Act 1971* s 13.

79 Consultations 7, 15, 23, 25, 44; submissions 13, 19, 22, 29, 30, 32, 39, 44, 46.

80 Submission 22 suggested three years, submission 13 suggested three or five years, submissions 19, 44, five years.

81 *Magistrates' Court Act 1989* s 120(2) provides for appointment and s 123(a) retirement of bail justices.

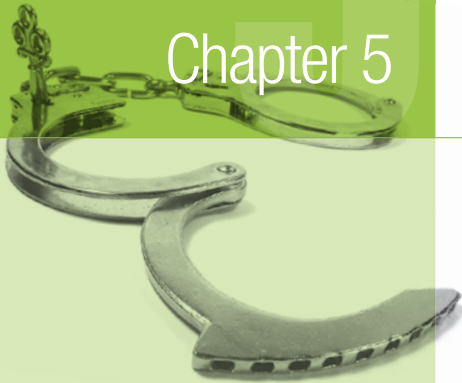
82 Royal Victorian Association of Honorary Justices, *Code of Conduct* (2000) <[www.rvahj.org.au](http://www.rvahj.org.au)> at 14 March 2007.

83 Submissions 18, 44, 46.

84 Consultation 25; roundtables 1, 2.

85 Roundtable 2.

86 Submissions 11, 46.



The appearance of impartiality is particularly important because of the environment in which decision making occurs—a police station. Removing hearings from police stations was one of the reasons commonly raised for preferring a court-based model to the current bail justice system.<sup>87</sup> It is imperative that bail justices remain aware of the high standard that must be maintained to overcome the difficulties of the environment.

Bail justices are given the authority to make a decision affecting a person's liberty. Given the responsibility of this role and the criticisms we have heard, we believe a comprehensive code of conduct should be developed and included in the new Bail Act as a schedule or regulations. We recommend that a serious breach of the code of conduct should result in removal. This will allow removal for inappropriate behaviour or misconduct, whether it occurs in the course of a bail justice's duties or outside those duties. It will also allow removal for neglect of duty, that is, being unreasonably unavailable for a roster.

The code should be based on the current Department of Justice draft but take into account the recommendations in this report.<sup>88</sup> On the basis of criticisms we have heard, the code should emphasise:

- acting impartially and with integrity
- maintaining the appearance of impartiality and independence
- maintaining independence from the parties
- behaving appropriately both in hearings and in the community
- actively undertaking duties
- limiting contact with the media.

### MISCONDUCT AND REMOVAL

The procedure for removal of a bail justice in the Magistrates' Court Act is complex, time consuming and expensive and, until recently, was identical to the process for removing a magistrate.<sup>89</sup> This is anomalous because bail justices are volunteers, there are many more of them than magistrates and they do not exercise judicial powers comparable with those of magistrates. The removal process is so difficult that it has never been used. This is despite the fact that bail justices can be removed for 'dereliction of duty' and more than 100 are currently not on a roster.<sup>90</sup> The onerous requirements have significant implications for

dealing with misconduct or neglect of duty by bail justices. In our Consultation Paper we asked if the removal provisions should be replaced with a simpler model.<sup>91</sup>

The submissions that addressed this issue all thought the current removal process was unduly onerous and inappropriate.<sup>92</sup> Dr Chris Corns submitted that the current provisions are inappropriate because a bail justice is not a member of the judiciary and the 'complex and stringent' removal provisions for members of the judiciary should not apply to removal of a layperson. As the legislation stipulates that the Attorney-General appoints bail justices, and bail justices tender their resignation to the Attorney-General, Dr Corns thought the Attorney-General would be the appropriate person to remove a bail justice from office, rather than the Governor-in-Council.<sup>93</sup> The Magistrates' Court submission suggested the Attorney-General, upon recommendation by the Chief Magistrate.

Aside from the onerous procedural aspects, the current removal process is also problematic because bail justices can only be removed for misconduct if it occurs 'in the performance of the duties of their office'.<sup>94</sup> If, for example, a bail justice used the position improperly to gain advantage, or misrepresented the role's powers, it would not be grounds for removal if it occurred outside a bail hearing.

In the absence of a legislative ability to deal with many instances of misconduct, the RVAHJ developed its own procedure for dealing with complaints. It has instituted regular meetings with stakeholders to address problems or complaints as they arise, and more serious matters are dealt with through 'retraining, written advice or mediation'. However, the number and nature of complaints the Department of Justice has recently reviewed indicate the need for an investigating body with greater authority, including the ability to effect removal. The RVAHJ does not believe the current legislative sanctions are sufficient, as it says in its submission: 'The RVAHJ has long held that the removal process is cumbersome, inefficient and is the only real sanction that is open to address bail justice behaviour'.

The RVAHJ has also advocated to the department for a review panel, similar to the current appointment panel. The review panel would deal with all complaints and be able to impose a range of actions, from investigation to retraining, suspension and removal by the Governor-in-Council.

## RECOMMENDATIONS

62. The provisions in the *Magistrates' Court Act 1989* regarding the removal of bail justices should be repealed.
63. The removal provisions should be enacted in the new Bail Act as follows:
- (1) If the Secretary of the Department of Justice is satisfied that a bail justice has breached the code of conduct the Secretary may suspend the bail justice from office.
  - (2) As soon as practicable after the Secretary suspends a bail justice, the Secretary may, depending on the nature of the seriousness of the breach, either:
    - a) direct the bail justice to engage in counselling, training or re-accreditation; or
    - b) nominate a person whom the Attorney-General must appoint to undertake an independent investigation into the bail justice's conduct.
  - (3) If the Secretary makes a direction under 2(a), the Secretary must lift the suspension once the bail justice has satisfactorily completed the counselling, training or re-accreditation.
  - (4) If the Secretary makes a direction under 2(a) and the bail justice without valid excuse does not comply either by not attending or not engaging in counselling, training or re-accreditation, this constitutes grounds for removal.
  - (5) A person appointed under 2(b) must:
    - a) investigate the bail justice's conduct; and
    - b) report to the Attorney-General on the investigation; and
    - c) give a copy of the report to the bail justice and the Secretary.
  - (6) The report under (5)(b) may include a recommendation that the bail justice be removed from office.
  - (7) After receiving a report under (5)(b) recommending removal, the Attorney-General, after consulting the Secretary, may recommend to the Governor-in-Council that the bail justice be removed from office.
  - (8) The person who conducted the investigation and the Attorney-General may only recommend that a bail justice be removed on the ground that the bail justice is not a fit and proper person to remain in the office because of dereliction of duty or proved misbehaviour or incapacity which includes, but is not limited to:
    - a) the bail justice is guilty of an indictable offence or of an offence which, if committed in Victoria, would be an indictable offence; or
    - b) the bail justice is mentally or physically incapable of carrying out satisfactorily the duties of his or her office; or
    - c) the bail justice is incompetent or is in neglect of duty; or
    - d) the bail justice has engaged in unlawful or improper conduct in the performance of the duties of his or her office; or
    - e) the bail justice has committed a serious, wilful or sustained breach of the code of conduct.
  - 9) The Attorney-General must not make a recommendation under (7) unless the bail justice has been given a reasonable opportunity to make written and oral submissions to the person who conducted the investigation and the Secretary.
  - (10) In making a recommendation under (7), the Attorney-General is entitled to rely on any findings contained in the report under (5)(b).
  - (11) If the Attorney-General decides not to make a recommendation under (7):
    - a) the Attorney-General must inform the Secretary as soon as practicable after receiving the report under (5)(b); and
    - b) the Secretary must lift the suspension.

87 Roundtable 2.

88 Guidance could also be obtained from the Guide to Judicial Conduct which applies to judicial officers throughout Australia, though many aspects will not apply to bail justices: Australian Institute of Judicial Administration, *Guide to Judicial Conduct* (2002).

89 The provision for removal of a bail justice is reproduced in Victorian Law Reform Commission (2005) above n 1, Appendix 2. The procedure for magistrates was the same up until 2006 when the removal provisions for magistrates became the same as those for other judicial officers: *Constitution Act 1975* ss 87AAA–87AAB.

90 *Magistrates' Court Act 1989* s 122(2)(c) provides for removal of bail justices for neglect of duty.

91 Victorian Law Reform Commission (2005) above n 1, 45–46.

92 Submissions 13, 22, 39, 41, 46.

93 *Magistrates' Court Act 1989* s 120.

94 *Magistrates' Court Act 1989* s 122(2)(d).

## Chapter 5

# After-hours Bail Decisions

*As accused people are almost never legally represented before bail justices, training and guidelines should emphasise the maintenance of procedural fairness.*

The commission does not consider it appropriate for a panel that includes current bail justices to review complaints and decide on action to remedy them. A perception of bias could arise if the subject of the complaint was a close associate of a panel member, and it is possible that a complaint could arise against a bail justice on the panel.

The department has developed a policy for addressing complaints and allegations. Its process is to review all complaints against bail justices internally and discuss them with the complainant and the bail justice to determine appropriate action. It advises that many complaints are resolved this way.<sup>95</sup> If the complaint is more serious or cannot be resolved informally it may be referred to an independent external person for review. Complaints about the conduct of people in their role as a bail justice and conduct that has the potential to bring the office of bail justice into disrepute are reviewed.<sup>96</sup>

The department advises that procedural fairness underpins all aspects of a review. Bail justices are formally invited to participate in the review, but if they refuse the review still proceeds. A report is completed detailing the process undertaken, who was interviewed and what they said, an analysis of the evidence, consideration of options, and recommendations. It is envisaged that the recently established Bail Justice Reference Group will be consulted about complaint handling policies but will not have any role in dealing with individual complaints.<sup>97</sup>

The process used by the Department of Justice is appropriate and should be formalised and included in legislation as part of the suspension and removal process. Although some submissions favoured the Attorney-General to make the removal decision, the commission believes retaining the Governor-in-Council will ensure there can be no criticism of the process on political grounds.

There is no justification for a removal process equivalent to that used for judicial officers. Suspension and removal should not require an application to the Supreme Court by the Attorney-General, as the Magistrates' Court Act currently stipulates. In keeping with our recommendations about departmental administrative oversight, we believe the appropriate person to suspend bail justices is the Secretary of the Department of Justice.

The secretary should also have power to direct a bail justice who has breached the code of conduct to engage in counselling, training or re-accreditation. If a breach is more serious, the

secretary should have the power to nominate an independent investigator to be appointed by the Attorney-General.

The power to remove should remain with the Governor-in-Council on the recommendation of the Attorney-General following investigation and a report by an appointed investigator that there are grounds for removal. The provisions in the *Victorian Civil and Administrative Tribunal Act 1998* that provide for suspension and removal of a non-judicial member, and those in the Magistrates' Court Act regarding judicial registrars, provide a useful model.<sup>98</sup> Our recommendation for the suspension and removal procedure is based on these provisions.

Not every breach of the code of conduct should automatically justify removal. A decision about whether a breach is serious enough to warrant removal should be made in each case. Counselling, training or re-accreditation should be directed for less serious breaches of the code. Examples of less serious breaches could include a bail justice having inadequate knowledge of the law or procedure, or being unavailable for the roster without a valid excuse for a short period. Some less serious breaches may warrant counselling rather than training, such as inappropriate behaviour in a bail hearing or in the community. If the breach is more serious or wilful and sustained, investigation by an independent person would be warranted. Serious breaches would include: ongoing neglect of duty; impropriety in a bail hearing or in dealings with the police; impropriety in the community; overstating or misusing powers in a hearing or in the community; and criminal charges.

The independent reviewer's report should be provided to the bail justice and the department Secretary. The bail justice should be invited to submit a response to the Secretary that will be considered by the Attorney-General along with the report. If the Attorney-General recommends removal to the Governor-in-Council, the report and response should be provided with that recommendation. After considering all the material the Governor-in-Council may decide to remove the bail justice from office.

As the suggested provision does not preclude review, the Supreme Court's inherent jurisdiction to review the removal decision will be retained.<sup>99</sup> The recommended process emphasises procedural fairness for the bail justice and provides guidance about conduct, but makes the procedure less difficult to use by removing the cumbersome requirement to apply initially to the Supreme Court.

## BAIL JUSTICE HEARING GUIDELINES

The way bail justices conduct hearings varies widely. The conduct of a hearing is covered in training but the Department of Justice only began issuing procedural guidelines to trainees in the late 1990s. The current guidelines were updated in 2005. The guidelines include a running order for the hearing, a suggested script for matters that should be explained to the accused, suggested wording that may be used when advising the accused that bail is granted or refused, and the wording of the formal order in each case. It does not appear that the guidelines have been issued to all bail justices. The Geelong Association of Honorary Justices' submission questioned why this had not occurred.

In the Consultation Paper we asked if detailed guidelines should be issued to bail justices about how a bail hearing is to be conducted and, if so, what they should contain and what status they should have.<sup>100</sup> All submissions that addressed this thought guidelines would be useful and most thought they should not have any statutory authority.<sup>101</sup> The Magistrates' Court thought the guidelines should provide 'the norm'. Bail justice Stephen Mayne thought the guidelines should be 'in the form of a code of practice', while John Fox thought 'a bail justice should be free to adapt the process to the specific situation within general guidelines' because a hearing in a small country police station may be different to one in a large city station.

The RVAHJ has created what it calls 'aides memoirs' for its members to use in hearings. These include Record of Hearing forms for bail and Interim Accommodation Order hearings, and a guide to the forms required by the Act or Regulations for these hearings. The Record of Hearing form for bail provides a guide to the

order of proceedings and the kinds of issues that should be considered. It provides more guidance than the department's guidelines, which lack prompts about the types of issues that could be raised by accused people to support their application, reasons for refusal of bail, and welfare or medical concerns of the accused. These are all contained in the RVAHJ document.

We believe bail justice hearings should be less formal than a court but certain standards must be maintained, such as ensuring the accused is given a fair hearing, has the process explained, and is given the reasons for a decision. This should be the case no matter what type of police station the hearing is conducted in, or where in the station it occurs. Guidelines are important to ensure all relevant issues are covered in hearings. As accused people are almost never legally represented before bail justices, training and guidelines should emphasise the maintenance of procedural fairness. Many accused people will require questioning and prompting to raise issues relevant to the bail decision. The RVAHJ form prompts bail justices to question accused people about their personal details. Guidelines should also cover issues that may be raised by accused people to support a bail application, such as any treatment, counselling or other support being undertaken or available.

If an accused is to remain in custody, questions about welfare are imperative. Court, police and corrections practices recognise the increased risk of suicide in the first 24 hours of incarceration, particularly for Indigenous Australians. Mental or physical health problems are common among the prison population. Some of the issues that should be checked by bail justices are noted on the RVAHJ form. When an accused is remanded by a magistrate, custody management issues are noted on the remand warrant. This should also

## RECOMMENDATIONS

64. Detailed guidelines about how to conduct a bail hearing should be created and issued to all bail justices. They should be based on the Royal Victorian Association of Honorary Justices Record of Hearing form.
65. The guidelines should state that on authorising continued detention of an accused the bail justice must enquire about the accused's health and wellbeing, note any custody management issues on the remand warrant and notify the custody sergeant.
66. The Code of Conduct should state that guidelines for bail justice hearings should generally be followed.
67. The Department of Justice should develop and implement a policy for secure storage and disposal of notes and records of hearing produced by bail justices as a matter of priority.

95 Information provided by Project Director, Honorary Justices Unit, 28 February 2007.

96 Information provided by the Department of Justice, 22 September 2006.

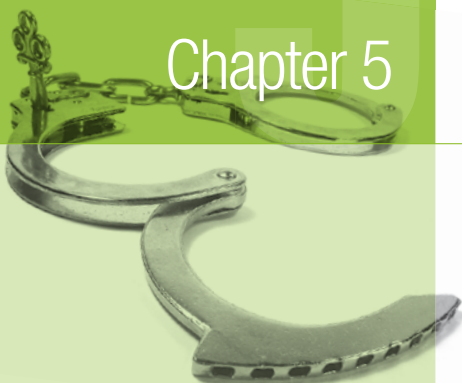
97 Information provided by Project Director, Honorary Justices Unit, 28 February 2007.

98 *Victorian Civil and Administrative Tribunal Act 1998* ss 22, 23; *Magistrates' Court Act 1989* ss 16G, 16H.

99 *Constitution Act 1975* s 85(1).

100 Victorian Law Reform Commission (2005) above n 1, 46.

101 Submissions 8, 11, 18, 19, 22, 24, 30, 36, 39, 41, 46.



be done by bail justices after making inquiries with the accused. The Courtlink system used by the Magistrates' Court contains a checklist of custody management issues:

- Aboriginal descent
- withdrawing from a drug of addiction
- risk of self harm
- psychiatric illness
- intellectual disability
- vulnerable due to age and/or appearance
- physical injury
- undiagnosed disability/illness.

Guidelines should advise bail justices to inquire about these issues and record them on the remand warrant, as well as advising the custody sergeant. They should not attempt to resolve issues or engage in counselling or advising the accused. Guidelines should also cover what to do if a bail justice has concerns about police treatment of the accused. The department's Honorary Justices Coordinator can provide information about police complaint processes and will also keep a record of the complaint.<sup>102</sup>

Information about bail justice hearings assists in policy making in this area. The records bail justices make of hearings may also be useful to them if for some reason they are called as a witness in a trial to give evidence about what they have heard or observed. Some bail justices already keep such records, which also raises issues about privacy of information. The department should develop a policy about secure storage and disposal of this information.

Hearing guidelines should be separate from the Code of Conduct, but the code should stipulate that guidelines exist to ensure coverage of all relevant issues and a fair hearing for the accused, and should generally be followed. Though bail justice hearings should not be conducted like a court, they should be conducted in a manner that makes it clear to accused people that a hearing is occurring and they are facing an independent and impartial decision maker.

### WHERE HEARINGS ARE CONDUCTED

As we have noted, the environment in which bail justice hearings occur is not ideal. In its submission Fitzroy Legal Service noted

*... this decision making occurs in an environment (usually a police station) where impartiality (or the appearance of impartiality) is unlikely to be achieved or perceived by an accused. This severely undermines its effectiveness and appropriateness.*

Hearings in police stations may occur over the charge counter in the watchhouse, in an office surrounded by the paraphernalia of police business, or in a separate room. Bail justice hearings may also take place in the Melbourne Custody Centre under the Magistrates' Court.

The Department of Justice advises that the choice of hearing environment differs according to local practice. It is also driven by the demeanour of the accused person and any associated security risks for all the hearing participants. Some of the newer police stations have rooms that can be accessed from both the public and secure areas.<sup>103</sup> The RVAHJ recommends to its members that hearings be conducted in a room or office. Bail justice Stephen Mayne also submitted that where possible hearings should be conducted in a purpose-built room, not at counters.

The commission is concerned that in some locations hearings are routinely conducted over the charge counter in the watchhouse. This does not assist with an appearance of impartiality. Hearings should be conducted in a space which is as separate from the ordinary operation of the police station as possible. We understand that facilities differ from station to station but this should not be an excuse for the hearing to be conducted in a way that is most convenient for the police. The hearing must have the appearance of a process independent of police. Hearings should not be conducted over charge counters unless an honest assessment is made that the accused poses a physical threat to the bail justice which cannot be overcome through the presence of police. All new and renovated police stations should include a room that can be accessed from both the public and secure areas which can be used for bail justice hearings.

## OPEN AND CLOSED HEARINGS

The media's role in bail justice hearings arose in our initial consultations and we noted it when discussing guidelines for hearings in the Consultation Paper.<sup>104</sup> The Herald and Weekly Times' submission argued that as the Bail Act does not distinguish between hearings before courts or bail justices, the provisions in the Magistrates' Court Act about conducting proceedings in open court apply to bail justice hearings.<sup>105</sup> The lack of clarity about this issue is another example of the problems caused by the Bail Act not distinguishing between decision makers. It also highlights the problems caused by hearings occurring in police stations.

We do not believe the Magistrates' Court Act provisions apply to bail justice hearings. Bail justices are not magistrates and do not preside over a Magistrates' Court or have the broad powers of magistrates. The Bail Act does not stipulate that bail justice hearings should be public hearings, or give bail justices power to make orders outside of bail orders.

Bail justice hearings occur in a police station. The many problems associated with bail justice hearings occurring in police stations are acknowledged in this report. Because it is an operational environment where offenders are being processed and police business is occurring, it cannot be compared to the court setting. Although the bail justice controls the bail proceeding, police control the physical environment. It would be impractical for bail justices to make orders about who could be at the hearing because they will not know what else is occurring in the station, or what police resources are available to ensure everyone's safety.

The commission fully endorses the principles of open justice. We believe that as a general rule interested members of the public and the media should have access to bail justice hearings. If hearings occur in operational areas of the station it may be more difficult to accommodate the media and public. Hearings should take place in a dedicated space or away from the other business of the police station. When this principle is adhered to there should be fewer practical problems with media or public attendance.

Victoria Police policy states that members of the public or media may attend bail hearings on police premises provided they do not pose a security risk, or it is otherwise impractical.<sup>106</sup> We believe there should be a general rule in favour of open hearings and police policy should be changed to place greater emphasis on facilitating access. However, we also acknowledge that security issues may arise and the final decision about allowing the public into the station must remain with the officer-in-charge. As bail justices remand accused people to the next sitting day, the media have access to the court bail hearing within a relatively short time.

## RECOMMENDATIONS

68. Bail justice hearings should be conducted in a space which is as separate from the ordinary operation of the police station as possible. All new and renovated police stations should include a room that can be accessed from both the public and secure areas which can be used for bail justice hearings.
69. The Victoria Police policy on the presence of the public or media at bail hearings should be amended. As a general rule interested members of the public and the media should have access to bail justice hearings. Wherever possible hearings should take place in a part of the station easily accessible to the public and arrangements should be made by police to facilitate attendance if requested. Public and media access to the hearing should only be refused if their safety will be endangered or they pose a security risk. As hearings occur in police stations, the decision about whether to admit members of the public or media must remain with the officer-in-charge.

102 Information provided by Project Director, Honorary Justices Unit, 28 February 2007.

103 Information provided by Project Director, Honorary Justices Unit, 28 February 2007.

104 Victorian Law Reform Commission (2005) above n 1, 46.

105 *Magistrates' Court Act 1989* ss 125, 126.

106 Victoria Police, *Victoria Police Manual* (2 October–5 November 2006) Instruction 113-6, Bail and Remand 5.9.

# After-hours Bail Decisions

### NO TIME LIMIT ON CALL-OUT

In some police regions a practice has developed of not calling a bail justice after a certain time of night.<sup>107</sup> There is no legislation or policy covering this issue and practice appears to vary from station to station. We asked for submissions on whether there should be a time limit for calling bail justices to a police station, and if so, what cut-off time was appropriate.<sup>108</sup>

The majority of submissions addressing this thought there should be no time limit on when a bail justice is called out.<sup>109</sup> Most thought that a cut-off time should not be stipulated, but a practical approach should be adopted. Bail justices should be available when needed but if the court is due to open within a few hours it may not be necessary to call a bail justice. Some submissions thought there should be a time limit. The Police Association and one bail justice supported a midnight time limit.<sup>110</sup> Others supported the practical approach discussed, that is, cut-offs of two to four hours before court sittings.<sup>111</sup>

If the bail justice system is to be retained, we believe it is important for bail justices to be available as needed outside of court hours. We agree with Victoria Legal Aid's submission that: 'Imposing a limitation defeats the purpose of providing bail justices as an after-hours alternative ...'.

If it is early morning and the court will be open within a few hours, a pragmatic decision should be made by police in each case about the benefit of calling a bail justice. This should take into account the personal circumstances of the accused, particularly children, who should be released from custody as soon as practicable. The Victoria Police Manual currently states that the decision should be made based only on the length of time before court opens and the availability of a bail justice or difficulties in obtaining a bail justice.<sup>112</sup> This should be amended to take into account the needs of the accused.

### RECOMMENDATIONS

70. The Department of Justice and Victoria Police should institute a policy of no time limit on when the police may call a bail justice to attend a bail hearing outside of court hours. This should be monitored to ensure it is being adhered to by police and bail justices. The Victoria Police Manual should be amended to include consideration of the needs of the accused person in the decision about whether to call a bail justice.

107 Victorian Law Reform Commission (2005) above n 1, 50.

108 Ibid 51.

109 Submissions 11, 13, 22, 24, 29, 30, 38, 39.

110 Submissions 6, 8.

111 Submissions 19, 46, 48.

112 Victoria Police (2 October–5 November 2006) above n 106, 4.1.2.